No. 15,673

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT LEE KORTE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

Jurisdiction is invoked under Title 18 United States Code, Section 32-31, Title 50 United States Code, Section 462, and Rule 37(a)(1) and (3) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on March 27, 1957 for failing to comply with the order of his Local Board to report to his Local Board for instructions to proceed to a place of employment for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest as provided for in the Universal Military Training and Service Act of

1948, as amended, in violation of the Universal Military Training and Service Act of 1948, as amended. (TR 4.) On June 3, 1957, after waiving trial by jury, appellant was tried by the Court, The Honorable Michael J. Roche presiding. (TR 9.) On June 4, 1957 appellant was found guilty as charged. (TR 60.) On June 17, 1957, appellant was sentenced to nine months imprisonment. (TR 6, 7.) Notice of appeal was timely made to this Court. (TR 7, 8.)

Appellant was originally classified Class 1-A. (Exhibit 1.) After being ordered for induction into the Armed Forces of the United States, appellant refused to submit for induction and was tried and convicted of a violation of the Universal Military Training and Service Act, on July 13, 1953. (Exhibit 1.) Appellant was sentenced to eighteen months imprisonment. (Exhibit 1.) Appellant was released from the penitentiary on March 24, 1954, on parole. (Exhibit 1.) His parole apparently expired on February 2, 1955. (Exhibit 1.) On January 25, 1955 the appellant's Local Board secured information from the defendant indicating the violation and sentence above described. (Exhibit 1.) On February 4, 1955, appellant was classified 1-A. (Exhibit 1.) On April 18, 1955 appellant appealed his classification of 1-A. (Exhibit 1.) His case was then referred to the Department of Justice for a hearing. (Exhibit 1.)

On August 30, 1955 appellant was ordered to report on Sept. 9, 1955 for an Armed Forces physical examination and directed to report to the Army Induction Station at 30 Van Ness Avenue in San Francisco,

California. (Exhibit 1.) He received such an examination on that date. (Exhibit 1.) On November 21, 1955 the United States Army Induction Station requested the Adjutant General to determine appellant's eligibility for induction in view of his criminal record. A moral waiver for induction was approved by the Adjutant General on 8 December 1955 after the joint induction screening group for the Army, Navy, Air Force and Marine Corp approved such a waiver. On December 14, 1955 the Induction Station Commander executed a certificate of acceptability certifying that as of that date appellant was found fully acceptable for induction into the Armed Forces.

On February 29, 1956 the Department of Justice recommended that appellant's claim of conscientious objection be sustained. The Appeal Board then on July 26, 1956 classified appellant 1-O. (Exhibit 1.)

On August 1, 1956, appellant refused to volunteer for civilian work in lieu of induction. (Exhibit 1.)

On October 18, 1956 appellant was interviewed by the Local Board but refused to accept any civilian work that was offered. The Local Board determined on that date that work was available as an institutional helper for the County of Los Angeles, Department of Charities. On November 14, 1956 appellant was ordered to report to his Local Board on November 26, 1956 for instructions to proceed to a place of employment. It was stipulated at the trial that the defendant knowingly failed to report to his Local Board as ordered on November 26, 1956 to receive instructions to report for work. (TR 10.)

At the trial the Selective Service file was admitted in evidence as United States Exhibit 1.

QUESTIONS PRESENTED.

1. Does conviction of a felony grant permanent deferment from obligation under the Universal Military Training and Service Act?

2. In the absence of any statement by the Appeal Board, must it be presumed that the Board failed to follow Selective Service Regulations?

ARGUMENT.

I. CONVICTION OF A FELONY DOES NOT GRANT PERMANENT IMMUNITY FROM SERVICE.

Appellant argues that since he had previously been convicted of a violation of the Universal Military Training and Service Act that he was entitled, as a matter of law, to a 4-F classification. In his words, "Section 6(m) of the Act, in the proviso clause thereof, releases from training and service any person who has been convicted of a felony." (Page 8 Appellant's Brief.) Section 6(m) of the Universal Military Training and Service Act provides

> "no person shall be relieved from training and service under this Title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year."

This statute is not a direction on the part of Congress to exempt from "training and service" those persons convicted of felonies, but on the contrary is an injunction not to defer from training and service those persons who have been convicted of misdemeanors. The statute makes a deferment permissible when there has been a conviction of a felony, but does not require that exemption be granted.

Two cases have considered the argument that a prior conviction of a felony relieves a registrant from his Selective Service liability. These cases are *U. S. v. Doty,* 218 F.2d 93 (8th Cir. 1955), and *U. S. v. Bouziden,* W. D. Okla. 108 F. Supp. 395. In the *Doty* case the Court stated as follows,

> "Persons convicted of an offense which may be punishable by death or by imprisonment for a term exceeding one year are not made ineligible for service under the act. They may be rejected by the Draft Board or by the Military authorities at the time they reported for induction, but their acceptance or rejection rests in the discretion of the Draft Board or the Military authorities. The statute grants such persons no immunity from their obligations under the Act."

A 4-F classification granted because a registrant has been convicted of a crime is not given for the benefit of the registrant. It is given for the benefit of the Armed Forces. In other words, a conviction of a felony does not create in a registrant any special right to consideration. By his conviction he has not merited the consideration shown by Congress to World War

II veterans for example. The reason for the 4-F classification is simply that the agencies entrusted with selecting personnel to defend the United States feel that it would not be to the interest of the Services to have some convicted felons in their ranks.

Conviction of a felony is simply a moral disqualification from service in the Armed Forces. It is a disqualification because some felons might contaminate other Service personnel or steal from the Government.

It is common knowledge that during some periods specific physical defects disqualify individuals from service and in some periods they do not. The needs of the United States for manpower in the Armed Forces varies from time to time. Many countries at war have come to the point of drafting amputees. The physical defects that might disqualify an individual during periods of peace and relative calm may be disregarded when the Nation is in danger. Moral disqualification standards also must vary. In reaching their decisions Selective Service Boards are selecting the Nation's military personnel from the Nation's citizenry and must act for the benefit of the National welfare and not primarily from the viewpoint of an individual's interest or preference. *Local Draft Board No. 1 v. Connors,* 9th Cir., 124 F.2d 388. No classification is permanent. Selective Service Regulation 1625.1. The Selective Service Boards must provide men for service under the shifting standards which the needs of the Services require.

The Universal Military Training and Service Act provides in Section 4a that,

> "No persons shall be inducted into the Armed Forces for training and service or shall be inducted for training in the National Security Training Corps under this Title until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense."

Pursuant to this legislative mandate there have been set up induction stations which "Determined by examination, registrants meet the physical, mental and moral standards for service in the Armed Forces." Department of the Army, Special Regulations approved 10 April 1953, SR615-180-1.[1] Prior to an order to report for induction a registrant receives an Armed Forces physical examination. Selective Service Regulation 1268.10. At this physical examination information is secured with respect to a registrant's moral standards. Under Department of the Army Special Regulation, approved 10 April 1953, SR615-180-1, Par. 10d, information concerning court convictions of a registrant is secured and placed on DD-Form 47. The full circumstances of the conviction are obtained from the registrant during a pre-induction interview which is provided by Par. 10 of the above cited regulation.

The Department of Defense Regulations provide that one who has been convicted of a felony is morally unacceptable for service in the Armed Forces unless

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[1]The Army regulations cited in this brief are the regulations which were applicable on December 14, 1955, which was the date appellant was found acceptable for service.

this disqualification is waived. SR615-180-1, Par. 10.d. (1). If a waiver is granted, however, then a registrant is acceptable to the Department of Defense. The regulations of Selective Service provide for the waiver situation in Section 1622.44(c), by providing for a 4-F classification for those convicted of felonies except for those who are "eligible for classification into a class available for service." When the moral disability is waived by the Department of Defense then a registrant is eligible for classification into a class available for service.

In the instant case the file reflects that appellant received a waiver from the Defense Department for his moral defect. There is no question in the instant case but that the regulations were followed and there is no procedural defect in the waiver procedures except the claim on the part of appellant that the statute forbids his induction.

It is apparently appellant's desire that he be immune from service to his Country, either in the Armed Forces or for civilian work contributing to the National welfare. Other individuals, however, who have been convicted of felonies may have completely rehabilitated themselves and may possibly desire to expiate their debt to society by contributing to their Country's defense. The rule contended for by appellant would deprive these individuals of their chance to take their place as completely rehabilitated members of a society in which service in the Armed Forces is the usual duty of a good citizen. This we submit as neither desirable nor does it appear to be the intent of Congress.

Some insight into the intent of Congress with respect to 6(m) of the Act can be gained by examination of the predecessor statute. The Act of November 13, 1942, 56 Stat. 1018, reads in part as follows: "No individual who has been convicted of any crime which may not be punishable by death or by imprisonment for a term exceeding a year shall by reason solely of such conviction be relieved from liability for training and service under this act." As can be seen from House Report 2574, 77th Congress, Second Session, the purpose of this amendment was to permit the utilization of those persons convicted of crime as a source of manpower in the discretion of the Selective Service authorities. In the debates, Mr. May, of the Committee on Military Affairs, stated as follows:

> "The committee wrote into the bill another section by way of amendment. I am sure every Member present knows of the practice and the rule in the War Department for some time that they would not induct into the service a man who had been convicted of a felony. That practice had gone even to the extent of not inducting men who had been convicted of misdemeanors; for instance, a man might be convicted under some provision of the national prohibition law, might be convicted of a breach of the peace, but such court conviction barred him from admission to the service. We have provided that no individual shall be relieved from liability for training and service under this act or held to be not acceptable to the land or naval forces for such training and service on the grounds of his having been convicted of any crime which is not a felony at common law if the local

> board determines that such individual notwithstanding such conviction is morally fit for service."

In response to a question as to whether it was the intent of the bill to give those persons a chance to fight if qualified, Congressman May stated as follows:

> "That is the intent of the committee and I may say that I have been of the opinion that sometimes a fellow who has maybe shot and wounded a man under the heat of passion or in sudden affray, and although convicted, would make a good soldier." (Congressional Record, October 17, 1942, p. 8275.)

It can be seen from the debates and House Report that Congress considered the possibility that an individual might have at one time in his life been convicted of a felony and yet had so rehabilitated himself as to become a valuable addition to the Nation's military forces. In addition Congress might have in mind not putting a premium on exemption for military service on the conviction of crime.

It would be a strange condition indeed if an individual who committed a crime which under the law is a felony could create for himself a complete immunity from service. Such a result cannot have been in the Congress' mind. The statute was enacted for the purpose of furnishing a guide to the Selective Service and Defense Department authorities in determining what persons should be exempted from service. It was obviously Congress' intent to direct that those persons convicted of misdemeanors should

not by that reason alone be ineligible for service. Nowhere does it appear that their intent was to utterly disqualify and grant immunity to men convicted of felonies who, nevertheless, in the judgment of the Defense Department might be morally acceptable. The Department of the Army and the Selective Service System by the implementing regulations above cited have provided for a proper and lawful exercise of the discretion granted under the Act to select individuals for service.

II. THERE IS NO PRESUMPTION THAT THE APPEAL BOARD ACTED CONTRARY TO THE REGULATIONS.

The second part of appellant's argument advances the proposition that the Appeal Board in this case failed to follow Section 1623.2 of the Regulations. It is claimed that the Appeal Board did not consider the various classifications under which appellant might have been classified from the lowest classification on up to the 1-O classification which he actually received. No particular reason is advanced for this conclusion except that he did not receive a 4-F classification which is the classification appellant argues he should have received.

Appellant argues he is presumed to be innocent; the Appeal Board did not expressly state that it did not use an improper classification method so, therefore, it must be presumed they used an improper method of classification. See p. 14 Appellant's Brief where he states, "It is true that the record does not disclose

expressly that the Appeal Board admitted that it did not follow Section 1623.2 of the Regulations but the record also does not show that the Appeal Board did follow the Regulation. Under *Steele v. United States,* 240 F.2d 142, 145-146 (1st Cir. 1956), the failure of the Government to prove that the appeal board did follow the Regulation prevents any speculation by this Court that the appeal board did follow the Regulation. It is true that there is a presumption of regularity of administrative proceedings but this presumption does not apply in criminal proceedings because of the presumption of innocence."

We submit that this argument is the most errant nonsense. The Selective Service regulations nowhere require that the Appeal Board include as a part of the record its deliberations, nor do the regulations require that the Appeal Board set forth the reasons for their classifications, nor does the Universal Military Training and Service Act require that they do so. The formal procedures required in a Court of Law are not required of an administrative body such as the Selective Service System. *U. S. v. Nugent,* 346 U. S. 1.

It simply does not follow that when the Appeal Board failed to state the reasons for his classification that a Court must conclude that it classified for the wrong reasons and in the wrong manner. The presumption of innocence obviously has nothing to do with the case. The uniform holdings of all the Courts have been that if there is a basis in fact for a classification the determinations of the Appeal Board must be upheld. *Witmer v. U. S.,* 348 U.S. 375, 380-381.

Appellant does not argue that there was not basis in fact for the Appeal Board to classify him 1-O. He simply states that the Court must assume because the Appeal Board did not state that it did follow its regulations, that it did not.

What appellant is actually submitting to the Court is the proposition that the deliberations of the Appeal Board must be presumed to be irregular. Simply stated, he is attempting to create a new and novel presumption, i.e., the presumption of administrative irregularity from silence. We suggest that if it is desirable that the Appeal Board state the reasons for its rulings and the manner in which they arrived at them, the proper body to enact this requirement into law is the Congress.

The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
April 1, 1958.

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(Appendix Follows.)

Appendix.

Appendix

STATUTES AND REGULATIONS.

Section 6(m) of The Universal Military Training and Service Act of 1948, as amended (50 App. 456m) Moral Standards.

"No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year."

Selective Service Regulation 1622.44 Class IV-F: Physically, Mentally, or Morally Unfit.

"In Class IV-F shall be placed any registrant (a) who is found to be physically or mentally unfit for any service in the armed forces; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation."

Selective Service Regulation 1628.10 Who Will Be Examined.

"Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 3. Functions of Induction Stations.

"The primary functions of induction stations are to—

a. Determine by examination which registrants meet the physical, mental, and moral standards for service in the Armed Forces."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10d. Moral Standards (except as provided in par. 27e.).

"Information concerning court convictions of a registrant and whether he is in custody of the law will be indicated on DD Form 47, under item 14a and b. More specific information concerning such an entry, especially with respect to personal background, the circumstances of the incident or incidents, and final disposition of charges will be obtained from the registrant at the induction station during the preinduction interview. If a

waiver is granted under (1) or (2) below, a copy of the report of investigation on which waiver is predicated will be attached to the original copy of the induction record (DD Form 47)."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10d(1).

"A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department . . . ".

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10e. Individuals ineligible for induction.

"Individuals listed below are ineligible for induction."

Administrative Disqualifications

(1)(c) "Registrants who fail to meet the prescribed moral standards indicated in d. above."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 14. Preparation and processing of records.

" . . .

b. DD Form 47. (1) Purpose.—DD Form 47 is the official form for recording the results of the administrative records examination during the registrant's preinduction and induction processing. It is a basic personnel document in the files of the Armed Forces and Selective Service System."